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Diversification of Ownership in the Regulated Industries - The Folklore of Regulation Antitrust and the Regulated and Exempt Industries

Roger C. Cramton

DIVERSIFICATION OF OWNERSHIP IN THE REGULATED INDUSTRIES—THE FOLKLORE OF REGULATION

by

ROGER C. CRAMTON
Associate Professor of Law
University of Michigan

"Diversification" is a word of many meanings. Investors commonly speak of limiting their risks through "diversification," that is, by distributing their investment among different securities. To many businessmen "diversification" is a coming of age, a sign that a company has reached a stage of size and opulence that justifies new products, new plants, research staffs, and national advertising. This type of diversification may rest on economies of scale or it may also be an attempt to limit risk by spreading commitments. The Federal Communications Commission refers to its policy of diffusing the ownership of broadcast licenses among a number of owners as "diversification." And members of the antitrust fraternity employ diversification, usually in connection with discussions of "conglomerate" as distinct from horizontal and vertical mergers, as a descriptive word referring to the production of different products (usually in separate industries) by the same firm.[1] In view of such varied usage, it is not surprising that "diversification" has the same root as the word "diversion," which Webster defines as "the act of turning a person aside from his course"; "that which relaxes and amuses; a sport or pastime."

Semantics aside, the inquiry to which this paper is directed is a plain one: the wisdom of regulatory policies which prohibit or control the opportunities of a regulated firm to engage in a business other than the one subject to specific economic regulation.[2] Policies of this type are fairly common in the regulated industries and no attempt will be made to be all-inclusive. After an introductory analysis, I will discuss three illustrative instances: (1) rail ownership of motor carriers; (2) newspaper ownership of broadcasting stations; and (3) combined ownership of local electric and gas utilities.

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[1] G. E. Hale and R. D. Hale, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT (1958) c.6, contains an able discussion of product diversification as an antitrust problem.

[2] In this paper the word "diversification" will be avoided because of its other usages, and the more descriptive terms "common ownership" or "combined ownership" will be used interchangeably to denote regulatory policies which prohibit or control the opportunities of a regulated firm to engage in a business other than the one subject to specific economic regulation.

I. Introductory Analysis

Assume that a railroad subject to economic regulation by the ICC desires to engage in unrestricted motor carrier operations in interstate commerce. Entry into the motor carrier field is restricted by law and there seems little reason why a rail owner should not be required to meet the usual tests applied to new entrants generally. That is not the issue. The issue is whether special restrictions, not applicable to other entrants, should be placed on a railroad merely because it is a railroad.

Why should the public or the regulatory agency be concerned one way or the other whether a motor carrier applicant is a railroad, a retired plumber, or a veterinarian? Or whether a broadcasting applicant is a newspaper, an insurance company, or a department store? The answer may be discovered only by reference to the effects of allowing or prohibiting combined ownership and the purposes of the regulatory statutes which are involved.

The effects of common ownership may be viewed in largely economic terms. If substantial economies of joint operation exist, it may be desirable to obtain them. Even if not, public policy does not generally support limitations on investment opportunities. On the other hand, if common ownership will or may lead to a decline of inter-industry competition, to an enhanced concentration of economic power in either of the industries involved, or to restrictive practices of one kind or another, common ownership may be undesirable. In short, if the goal of regulatory policy is to approximate the results which would be reached if competition were possible in the regulated industry, a weighing of the costs and benefits of a policy prohibiting or allowing common ownership provides a manageable assessment of that policy. Even though it may be difficult in any particular situation to predict the effects of a given policy, the task of measuring the effects against the competitive ideal is a familiar one to both economists and antitrust lawyers.

The peculiar difficulty confronting the regulatory agency (and its critic) is that it cannot approach common ownership with the relatively single focus of the antitrust laws: the promotion and preservation of economic competition. The regulatory statutes usually speak in terms of "the public interest" and those elusive and vagrant words may or may not include antitrust objectives within their purview. Indeed, a desire to limit or displace competition frequently provides the primary motivation for regulation. Even if the public-interest standard incorporates antitrust objectives, the promotion of selected types of competition is usually only one of a number of somewhat inconsistent objectives, each one of which is to be given an unassigned weight in reaching a decision. The phenomenon of weightlessness is not a unique experience of the space explorer! Moreover, matters of administrative convenience may bulk large. "Workable regulation" is as much a fact of life as "workable competition." If the ownership of unregulated businesses by regulated firms complicates the regulatory task, this in itself may prove a valid ground of objection.

Controversies concerning common ownership usually rest on unsupported assertions that unfortunate results will follow from the policy under attack. The implicit assumptions concerning regulatory objectives ordinarily remain unstated. A brief discussion of the major alternative effects of prohibiting or allowing common ownership will illustrate the interplay of regulatory objectives and economic effects.

First, common ownership may reduce competition within the regulated industry by leading to outside domination, monopoly conditions, or restraints of trade. For example, it is alleged that unrestricted rail entry into the motor carrier field would result in rail domination of motor transportation or in reduced motor carrier competition. This argument assumes that a degree of competition in the regulated industry is desirable, as well as that the existing competitive situation will be adversely affected by the entry of firms with other interests. *Per contra,* entry of an additional firm may intensify competition in the regulated industry, and artificial restraints on investment may reduce the supply of capital available for investment in the industry.

Second, common ownership may reduce inter-industry competition, such as between railroads and motor carriers. This argument assumes that the two industries are competitive with one another to some degree, and that inter-industry competition is desirable under the regulatory scheme. *Per contra,* by intensifying competition in one or both industries, inter-industry competition may be increased.

Third, common ownership may result in excessive competition which undermines the regulatory scheme. Unfair practices, cutthroat competition and excess capacity are the slogans at this point. This argument reverses the positions taken in the prior headings, since common ownership is here alleged to increase rather than decrease competition, which is now viewed as undesirable rather than desirable.

Fourth, common ownership may result in an uneconomic misallocation of resources, either because of excessive investment or because of undesirable promotion of one enterprise at the expense of a regulated enterprise. Thus an electric utility, promoting the sale of electricity by below-cost sales of electrical appliances, may attract business away from competing lower-cost fuels (as well as harming independent appliance dealers). *Per contra,* any restriction on combined ownership may deprive society of substantial economies of combined operation resulting in a different form of misallocation of resources.

Fifth, common ownership may lead to the demise of small and independent firms and their replacement by large, integrated and wealthy enterprises. The social desirability of small firms is here countered by the arguments that a preference for small business may be achieved only at the expense of efficiency and that in general it is desirable to preserve free and equal access to competitive opportunities, whether the enterprises be large or small.

Sixth, common ownership may be opposed on other social grounds implied from the regulatory scheme, such as the desirability in broadcasting regulation of promoting as wide a variety and diversity of viewpoints as possible in the media of mass communications. *Per contra,* it is argued that the additional revenues of a monopoly position are necessary to assure adequate programming; or that it is only fair that a regulated firm in a declining industry (a railroad) be allowed to continue by entering a growing competitive industry (trucking).

Finally, common ownership may aggravate the already difficult task of economic regulation. Whenever a regulated firm has activities in other fields, particularly if those activities are unregulated, costs must be apportioned, transactions scrutinized, etc. This argument rests on administrative convenience, not on the merits, but it may be an important consideration nonetheless.

This potpourri of representative arguments, policies and cliches reproduces in microcosm the ambivalent attitudes and assumptions concerning free competition current in our society. In brief compass it will not be possible to consider each in detail, but I will discuss several in the context of the regulatory policies applied in three different industries: motor transportation, broadcasting, and local utilities.[3]

[3] A word of caution is in order. Any discussion of common ownership is greatly hampered by the lack of empirical data concerning the effects of particular regulatory policies (*e.g.,* whether or not a policy of preventing combined ownership in a given situation denies the public the benefit of economies of joint operation) and by the ambiguity of regulatory objectives. In the absence of definitive information or crystallized policy, one must do the best one can with what is available. I have attempted to warn the reader by making my assumptions as explicit as possible.

II. Summary of Present Law and Practice

A. *Rail Ownership of Motor Carriers.* Three provisions of the Interstate Commerce Act are relevant to rail ownership of motor carriers and each of these provisions is not without interpretative difficulties.[4] Fortunately it is unnecessary to treat in detail the statutory language, the administrative interpretation, and the judicial decisions. Twenty-five years of application have resulted in a fairly clear-cut rule: a railroad may own and operate motor carriers, if otherwise in the public interest, only if such operation is auxiliary and supplementary to rail service.[5]

In practice, the requirement that motor carrier service be auxiliary and supplementary to train operations means that the motor service is performed on rail ladings at rail rates; that service is confined to points which are stations on the railroad; that longhaul motor transportation along the rail line, even in substitution of rail operations, is not permitted; and that the ICC retains power to impose further restrictions if subsequent developments so require. These are the special restrictions to which railroads so vociferously object.

B. *Newspaper Ownership of Radio and Television Stations.* From time to time the Federal Communications Commission has stressed the social and economic importance of limiting concentration

[4] The National Transportation Policy, 49 U. S. C., note preceding §1, lays a broad duty upon the Interstate Commerce Commission to administer the Act so as "to recognize and preserve the inherent advantages of each mode of transportation." Section 5(2)(b) of the Act (formerly section 213(a)(1) of the Motor Carrier Act of 1935, 49 Stat. 555) authorizes consolidation, merger, acquisition or lease of carriers if found by the ICC to be "consistent with the public interest." However, in transactions involving a motor carrier where a railroad or its affiliate is an applicant, Congress directed the ICC "not to enter such an order unless it finds that the transaction proposed" not only is in the public interest but "will enable such rail carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." The ICC, with judicial approval, has interpreted this language to confine acquisition of a motor carrier by a railroad to "operations . . . which are auxiliary or supplementary to train service." The third provision, section 207(a) of the Motor Carrier Act, 49 U. S. C. 307(a), authorizing the issuance of new motor carrier operating rights if the ICC finds that the proposed service is required by public interest, convenience and necessity, adds a further complexity because it does not contain any special limitations on railroad applications. The ICC, however, again with judicial approval, has carried over its concept of "auxiliary and supplementary service" to applications for new service filed under 207(a), with the special practice of allowing the issuance of unrestricted motor carrier rights to railroads if "special circumstances" are found to exist which make such a grant in the public interest.

[5] For a careful description and analysis of the statutory provisions, administrative decisions, and judicial decisions relating to motor carrier operations by railroads, see Fulda, Rail-Motor Competition: Motor-Carrier Operations by Railroads, 54 Nw. U. L. Rev. 156 (1959), a revised version of which will shortly appear as a chapter in a text on Competition in the Regulated Industries.

of control of the media of mass communications. Its so-called "diversification" policy, which awards a preference in a comparative hearing to applicants not connected with other communications media, purports to implement this objective.[6] Nevertheless, newspapers and other communications media have encountered few difficulties in entering the broadcasting business. The statistics speak for themselves: in 1959 a total of 755 radio and television stations were newspaper affiliated, constituting 14.3% of all radio (AM and FM) stations and 34.7% of all TV stations on the air.[7] The explanation is easily found: the FCC's "diversification" policy is applied only in comparative hearings (where more than one person applies for the same broadcasting facility), and even there is likely to be outweighed by other factors, such as local ownership or broadcast experience. Furthermore, the quantitative unimportance of the comparative hearing in the grant of radio and television licenses renders the policy almost completely ineffective. The vast majority of broadcast licenses are not operated at any given moment of time by a licensee who obtained his license in a comparative hearing. A much larger proportion of licensees obtain their licenses either through uncontested grants or as a result of purchase on the open market. For example, of 139 TV stations in which newspapers held a majority stock interest in early 1958, 72 had been obtained by the newspaper owners as sole applicants in uncontested grants; another 57 of the 139 stations had been purchased from other broadcasters; only 10 had been obtained through a comparative hearing in which the diversification policy would be treated as an adverse factor against the newspaper applicant.[8]

C. *Combined Ownership of Gas and Electric Utilities.* After some equivocation, the Securities and Exchange Commission in its administration of the Public Utility Holding Company Act of 1935 took the position that an integrated public utility system should not include both gas and electric companies, unless one of the services was incidental to the other or unless substantial economies resulted from joint operation.[9] The SEC, however, was concerned only with hold-

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[6] For a full discussion and critique of the FCC's so-called "diversification" policy, see Comment, Diversification and the Public Interest: Administrative Responsibility of the FCC, 66 Yale L. J. 365 (1957), which cites the leading decisions and commentary thereon.

[7] Data concerning newspaper affiliation is found in the Broadcasting Yearbook published by Broadcasting Magazine.

[8] Levin, Broadcasting Regulation and Inter-Medium Competition, 45 Va. L. Rev. 1104, 1120 (1959).

[9] See Ritchie, The Integration of Public Utility Holding Companies (1955) c. 4.

ing company systems; the responsibility of regulating operating companies was left to the states, which have been free to formulate their own policies regarding combined ownership.

The prevalence of common ownership of gas and electric utilities, which are found in almost all states, indicates that state public utility commissions have allowed if not encouraged combination. An incomplete search of state statutes and regulations indicates that in many states commission approval is required; that in other states the matter seems to be left to the discretion of utility management; and that in one state, Massachusetts, a statutory provision prohibits combined operation unless the commission finds that it will promote the public interest. Whatever the provision may be, it is apparent that a strong regulatory policy against combined ownership does not exist.

Thus in three regulated industries quite different policies are applied in situations of common ownership: severe restrictions are imposed upon railroads desiring to perform interstate motor carrier operations; a policy adverse to newspaper ownership of broadcasting facilties exists, but is ineffectively implemented; and there does not appear to be any consensus that common ownership of electric and gas utilities is unwise. Can these differences be justified? If not, which position is more nearly in accordance with the public interest which the regulatory schemes purportedly exist to serve?

III. An Evaluation of Regulatory Policies

A. *Rail Ownership of Motor Carriers: Strangulation vs. Coordination.* In the battle of words between railroads and motor carriers regarding the desirability of the present restrictions on rail ownership of motor carriers, two opposing theories are predominant. The truckers rely on the "strangulation" theory, arguing that rail entry will result in rail domination of motor trucking and a decline of rail-motor competition. The railroads, while disputing this theory, rest their affirmative case on the improved service and operating economies that rail-motor "coordination" allegedly would produce. An evaluation of present regulatory policy must examine the merits of these competing arguments.

1. *The strangulation argument.* The strangulation argument runs as follows: Railroads tend to be substantial companies with a large fixed investment in railroad plant and convenient access to large supplies of capital. If railroads are permitted to enter the motor carrier field, they will operate their motor carrier affiliates in order to protect their investment in railroad property. They will engage in predatory

price-cutting with the intent to drive their smaller, less well-financed motor carrier competitors out of business. Once they are successful, rates will be raised to monopoly levels. The result will be rail domination of motor trucking and an end to competition between the two modes of transportation.

The truckers do not concede that joint rail-motor operations would produce substantial economies; and they certainly do not take the position that railroads would be able to operate motor trucks more economically than they can. Motor transportation is a highly competitive field at present. The argument that rail entry under these circumstances will result in monopoly conditions rests on a series of assumptions which require examination.

The statement that the railroads would resort to predatory price-cutting in order to drive independent motor carriers out of business assumes that it would be profitable for them to do so and that capital on the scale required would be available to them to carry out the job. Both assumptions are questionable. If a profitable domination of motor trucking could be achieved by predatory price-cutting, it is not apparent why firms other than railroads would not be interested in making the attempt. And considering the present state of railroad finances, it seems likely that capital to carry on a war of attrition would be as readily available to the truckers as it would be to the railroads. Moreover, entry into the trucking industry does not require large sums of capital, and it is doubtful if a railroad could prevent truckers from re-entering even if price-cutting was successful in isolated situations. In summary, if this argument is valid as applied to the motor carrier industry, it would appear to be valid in competitive industries generally; and experience refutes such a view.[10]

The discussion thus far has ignored the existence of the regulatory scheme. When the strangulation theory is viewed in the context of the regulatory scheme, its weakness is even more apparent. Consider these points: (1) Even if the special restrictions on rail entry were removed, the ICC would be required to find that a rail acquisition of

[10] The argument here is related to the "recoupment" theory discussed by antitrust writers. See Bork, VERTICAL INTEGRATION AND THE SHERMAN ACT: THE LEGAL HISTORY OF AN ECONOMIC MISCONCEPTION, 22 U. of Chi. L. Rev. 157, 194-201 (1954); Bowman, TYING ARRANGEMENTS AND THE LEVERAGE PROBLEM, 67 Yale L. J. 19 (1957).

There is the special problem of the railroad substituting unprofitable motor carrier operations for even more unprofitable rail operations. This may occur because the railroad is unwilling or unable to abandon unprofitable operations, yet desires to minimize its losses. The fact that motor carrier operations are unprofitable will usually mean that the service is not one which competing motor carriers would want to provide, the most typical instance being small shipment and passenger service in rural communities.

a motor carrier was "in the public interest." (2) Any rail application for new operating rights would be subject to the ICC's policy of keeping competition within bounds and protecting existing firms from additional competition. (3) Predatory rates, presumably those not covering out-of-pocket costs, would be subject to ICC suspension and disapproval, and under present law would not be allowed. (4) Antitrust policies do have a limited relevance in motor carrier acquisition and certification cases.[11] It is doubtful that applications which would be likely to lead to monopoly would be approved.

The available empirical evidence, I believe, supports my doubts. It is said that the railroads once employed "fighting ships" on the Great Lakes and that they presently engage in lobbying activities designed to further railroad interests. One would hardly expect railroads to lobby in favor of new highways! The truth is that some railroads obtained unrestricted grandfather rights from the ICC and many others engaged in extensive intrastate motor carrier operations. In recent years about 2% of all motor carrier revenues have been earned by railroad affiliates. There does not appear to be any evidence of predatory price-cutting, or of rail domination of motor transportation in those areas in which railroads are presently engaged in extensive motor carrier operations. The motor carrier affiliates of railroads are operated as profit-making enterprises which are expected to make a return on the railroad's investment of capital in them.

2. *The coordination argument.* Self-serving arguments, however, are not confined to the truckers. The railroad argument seems almost as dubious. The railroads argue that integrated transportation companies would provide much better and much cheaper service because the most economic and desirable form of transportation would be utilized for each part of the transportation job. The economies of joint operation would more than offset any reduction in inter-industry competition. The argument for coordinated or integrated transportation assumes that situations of the following type are frequent: A shipper desires to ship goods from A to C. Shipment can be performed at lowest cost and with best service, or the most desirable combination of the two, if rail transport is utilized from A to B, an intermediate point between A and C, and motor transport from B to C. The railroads argue that the separate economies of operation of each mode on each of the two route segments outweigh the costs of transshipment from one mode to the other at B, and that the desire of each mode to handle the traffic for the entire distance prevents cooperative or other arrangements by which each would perform the transportation

11 See *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944).

functions for which it is best fitted. Each assertion is questionable. The cost and delay of transshipment may be greater than anticipated; and the unwillingness of railroads and truckers to engage in mutually profitable cooperation appears to be exaggerated. Moreover, if the rates on the separate route segments reflect cost differentials, as is increasingly likely under the pressure of rail-motor competition, shippers and freight forwarders will become aware of them and make their own arrangements to obtain their benefit. On the other hand, if the lower costs exist on a segment in which there is little competition, such as a rail line having some natural monopoly characteristics, it seems unlikely that the railroad will pass on its monopoly earnings to the shipper merely because the remainder of the haul is performed by a motor carrier affiliate of the railroad. Finally, there is no evidence that railroads can perform assembly and distribution functions any more cheaply than truckers or freight forwarders.

This discussion of rail entry into motor transportation has assumed that rail-motor carrier competition is desirable, in that it encourages or forces each mode of transportation to concentrate on the type of service that it can best perform, thus producing an optimum division of labor and allocation of resources. It should be emphasized that transportation policy is not unambiguous on the point. The promotional development of aviation, highways and internal waterways modifies the terms of intermodal competition; and the protective policies insulating existing carriers against new competition are in direct conflict with it. Thus an examination of regulatory policy toward rail entry which overlooks the complexity and ambiguity of public policy toward competition in transportation would be misleading.

B. *Newspaper Ownership of Radio and Television Stations.* In the field of broadcasting the general acceptance of competition as a desirable social policy simplifies the problem. Broadcasting is not subject to rate regulation in the United States, and existing stations do not have a right to be protected from new competition. The regulation is designed to ration a scarce commodity (the radio spectrum) and to insure certain minimum standards of service. Antitrust policies have correspondingly greater application and relevance; and regulatory policies can consequently be measured more along antitrust lines.

The principal arguments in favor of free entry of newspapers and other communications media are: first, that since broadcasting to some extent replaces the older media it is only fair to allow firms to continue by permitting them to shift their investment from the older to the newer media; and second, that there are economies of joint ownership of newspapers and radio stations which should be given effect. The first is an equitable argument which has had considerable influence on FCC policies, particularly with respect to entry of AM stations into FM and TV. The second is a large issue on which there is little available evidence. The most complete recent study, however, concludes that such economies either do not exist or are of slight magnitude.[12] FCC financial data comparing the reports of broadcast stations affiliated with newspapers and those not so affiliated supports the same negative conclusion.

I assume, then, that there would be no loss of operating economies if newspapers and other communications media were prohibited from owning broadcast stations. And with the present scarcity of facilities in the major cities, and high returns of existing stations, we may feel confident that the flow of investment funds into broadcasting would not be adversely affected by such a policy.

It will be recalled that the FCC's diversification policy is applied primarily to newspaper applicants, and only in the relatively unimportant context of the comparative hearing. Cross-channel affiliations, such as AM ownership of FM and TV stations, are not affected even when the stations are located in the same area. My conclusion is that the FCC has misdirected its energies and failed to prevent a degree of concentration which, although it may not be excessive, seems unwise when the Commission is engaged in rationing the limited supply of broadcasting facilities which has been artificially created by the Commission's allocation policies. Nearly 15% of all radio stations and nearly 35% of all TV stations are affiliated with newspapers; and a much larger proportion are affiliated with group owners, *i.e.,* firms owning two or more stations. Even more significant is the high degree of concentration which prevails in a great many communities: in 1958 the only local daily or weekly newspaper controlled the only radio station in 118 communities; and there were a substantial number of other communities, generally larger in size, in which the only newspaper, or one of two newspapers, owned two or three of the available broadcasting stations (AM, FM and TV).[13]

FCC regulatory policies may help in protecting advertisers in these communities from the more objectionable forms of combination rates and other restrictive practices. But to the extent that monopoly power over advertisers interested in reaching a particular market has been created, it would be unrealistic to expect that monopoly rates are not charged.

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[12] H. Levin, BROADCAST REGULATION AND INTER-MEDIUM COMPETITION (1960) c. 3. JOINT OWNERSHIP OF MEDIA (1960) c. 4.

[13] Id. at 80-81.

C. *Combined Ownership of Gas and Electric Utilities.* The desirability of the present regulatory indifference toward combined or separate operation of electric and gas utilities in the same area would appear to turn on a judgment concerning the desirable balance of two factors: the existence or magnitude of economies of joint operation; and the possibilities of inter-utility competition as an aid to public regulation. The SEC required proof of "substantial" operating economies before it would allow the continuation of gas and electric utilities in the same integrated public utility system; and apparently only a small number of situations met this test. Nor does it seem likely that such economies would be very great: most of those which have been suggested, such as savings on managerial and selling costs, the use of one meter reader rather than two for a given home, etc., would not appear too great in magnitude or are related more to the size of the utility than to the combination of two services. Combined and separate companies exist side by side in a large number of states, tending to indicate that economies of joint operation are not very great.

On the other hand, the benefits of inter-utility competition would appear to be limited by the monopoly position which each firm has. The almost universal practice in the United States is to prevent local utilities of the same type from competing with one another. Even though gas and electricity may still be competitive for many purposes, they are not for others; and in any event, the two firms in an area can be expected to cooperate for their mutual benefit. Nevertheless, it is arguable that the existence of some inter-utility competition will hasten innovation, encourage each utility to cater to the service it can perform more efficiently, and ease the burden of the regulatory commission. Specific economic regulation is a difficult task at best; it performs most creditably when competitive forces provide it with some assistance.

Conclusion

Of the three instances examined, the only effective limitation on the diversification of a regulated firm is found in the one case of rail entry into motor transportation. Although this limitation rests on historical practices which have little present-day application, it is probable that it does little harm. On the other hand, a greater concern about concentration in broadcasting, and not merely with newspaper ownership as a result of a comparative hearing, would be desirable. The antitrust laws can be vigorously applied where violations have occurred; and some supplemental use of regulatory powers is justified by the artificial restrictions on entry which result from FCC allocation of the spectrum. Finally, separate ownership of gas and electric utilities may have some beneficial effects if I am right in stating that substantial economies of joint operation are unlikely.

It should be apparent that these tentative conclusions are based on incomplete data as well as certain assumptions regarding the desirable objectives of particular regulatory schemes. Whatever the merits of the judgments I have reached, the method used has broad application: assessing the benefits and costs of the regulatory policy in the light of a sophisticated analysis of the objectives of the regulatory scheme.

The regulatory commissions bear the primary responsibility of developing sound policy on questions of common ownership, and a word in closing is appropriate concerning their unwillingness or inability to test prevailing slogans with methods of rational inquiry. At every point in this paper we have been faced with the bare assertion of competing slogans, cliches and unsupported factual assumptions. Yet most of the propositions asserted are capable of rational analysis and empirical observation. The commissions have large staffs; they have a continuing familiarity with the industries they regulate; their files are enormous repositories of the relevant information. Why, one wonders, do they not use some intelligence and some of this available information to test the propositions which are so freely asserted.

The ICC, for example, has refused to take any position on the numerous legislative proposals which would put the railroads on the same footing as other applicants for motor carrier rights. One can sympathize with the Commission's reluctance to offend any of its client groups by expressing a policy judgment on this heated issue. Yet the Commission, at the least, has a responsibility to develop the factual and analytical materials which would enable Congress to pass intelligently on the question. What are the economies of "integrated" transportation service? Is it likely that the railroads, if allowed to enter motor carrier operations, would operate their motor carrier affiliates in a manner harmful to the public interest? Have they done so in any of the numerous instances in which railroads have been given motor carrier operating rights? What are the economic effects of the restrictions presently placed on railroad motor carrier operation?

These and many other questions, relating to each of the instances I have discussed, are susceptible to observation and verification, at least in part. The regulatory commissions have not fulfilled the promise that called them into being if they continue to shirk the responsibility for formulating public policy which the legislatures have laid upon them.

Afternoon Session

1:30 p. m. to 3:30 p. m.

4. The Regulation of Aviation

    Carl H. Fulda
    Professor of Law
    Ohio State University

5. The Regulation of Motor Carriers

    George E. Hale
    Chicago, Illinois

6. Antitrust Enforcement by the Atomic Energy Commission

    Bennett Boskey
    Washington, D. C.

7. Exemptions for Cooperatives

    John Noakes, Esq.
    New York, New York